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No. 99-1206

Supreme Court, U.S.
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CLERK

In The Supreme Court of the United States

MICHAEL F. HAHN and MARIE HAHN,
Petitioners,

v.

STAR BANK; et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should this Court deny certiorari when the decision below does not raise the questions presented for review by the Petitioners, and the Petition instead would require this Court to make fact-specific determinations regarding the sufficiency of the evidence?

PARTIES TO THE PROCEEDING

The Petition accurately lists the Petitioners as Michael F. Hahn and Marie Hahn. The Petition accurately lists the Respondents with the following exceptions: (1) Respondent Star Bank, Central Ohio, ATIMA has merged with Firstar Corporation and is now known as Firstar Corporation, but will be referred to herein as Star Bank for the convenience of the parties and the Court; and (2) Respondent Domtar Gypsum is now known as G-P Gypsum, but will be referred to herein as Domtar-Gypsum for the convenience of the parties and the Court.

CORPORATE DISCLOSURE STATEMENTS SUBMITTED PURSUANT TO S.CT. RULE 29.6

For Respondents 84 Lumber and Home Center, Pierce-Hardy Real Estate, Inc. and 84 Associates, Inc.:

Respondent 84 Lumber and Home Center is a fictitious name for 84 Lumber Company, a Pennsylvania Limited Partnership. Respondents Pierce-Hardy Real Estate, Inc. and 84 Associates, Inc. have no corporate parents.

For Respondent Star Bank, Central Ohio, ATIMA:

Respondent Star Bank, Central Ohio, ATIMA has merged with Firstar Corporation and is now known as Firstar Corporation, which has no corporate parent.

For Respondents Domtar Gypsum and Georgia Pacific Corporation:

Respondent Domtar Gypsum, now known as G-P Gypsum Corp., is a wholly-owned subsidiary of Respondent Georgia Pacific Corp. Respondent Georgia Pacific Corp. has no corporate parent.

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STATEMENT OF THE CASE

All of Petitioners' claims in this case are based upon a single, demonstrably incorrect factual premise: that Star Bank improperly provided a copy of their loan file to Petitioners' opponent in other unrelated litigation without having been required to do so by a valid subpoena. But the undisputed evidence established that Star Bank produced Petitioners' loan file in response to a facially valid subpoena. Indeed, the supposedly non-existent subpoena is part of the record in this case. Because Petitioners' entire case is based upon a factual premise that the courts below have found to be incorrect, and because it involves no issues of overriding importance, this is not an appropriate case for consideration by this Court.

Petitioners, proceeding *pro se*, have presented six questions for review by this Court. Three of those questions were not part of the basis for the Sixth Circuit's decision and thus are not properly appealable or reviewable by this Court. The other three are based upon Petitioners' disagreement with the lower court's factual findings and with the Sixth Circuit's application of well-settled law in its affirmance of a routine procedural ruling on a discovery issue. These are not appropriate subjects for review on a Petition for Certiorari.

Petitioners' claims in this case arise out of a lawsuit that they filed in the Court of Common Pleas of Franklin County, Ohio in 1992 against Respondent 84 Lumber & Home Center ("84 Lumber"). There, the Petitioners claimed to have experienced problems with drywall that 84 Lumber had installed in a home that Petitioners were having built (the "Drywall Litigation"). 84 Lumber, which was represented by Respondents John Gonzales and Crabbe, Brown, Jones, Potts & Schmidt, impleaded Respondent Domtar Gypsum, the manufacturer of the drywall, which was represented by Respondent Thompson, Hine & Flory LLP, through one of its attorneys, Respondent William Leahy.

On October 8, 1993, in the course of the Drywall Litigation, Respondent Gonzales prepared and served a subpoena on Star Bank, which was not a party to the Drywall Litigation. The subpoena required the bank to produce "[a]ny and all files, documents, or other papers regarding Construction Loan No. 13953 in the name of Michael F. or Maria A. Hahn." Construction Loan No. 13953 was a loan that Star Bank had made to the Petitioners in September 1990 for construction of their home.

Petitioners' counsel in the Drywall Litigation, Mr. Michael Fusco, was served with a copy of the Star Bank

subpoena the same day that it was issued.[1/] The subpoena, which was attached to Star Bank's Motion for Summary Judgment and is part of the Court's file in this case, was served on Star Bank on October 12, 1993. Petitioners incorrectly state that the subpoena was void under Ohio law because it was overbroad, and that Star Bank, which was not even a party to the Drywall Litigation, had some sort of duty to move to quash "the overbroad subpoena." Petition, p. 11. But the subpoena very specifically requested only documents relating to construction loan No. 13953. In compliance with the subpoena, Star Bank produced a copy of that loan file to Respondent Gonzales sometime in mid-October, 1993.

On October 29, 1993, at the end of the trial of the Drywall Litigation, Respondent Gonzales gave Petitioners the copy of their loan file that he had received from Star Bank

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[1/] Respondent Gonzales submitted an affidavit stating that he sent a copy of the subpoena to Mr. Fusco, and authenticating a copy of his transmittal letter. *See* Petition, Court of Appeals Opinion – 9/2/99, p. 8a (referring to the "documentary evidence" presented by Respondent Gonzales). Petitioners incorrectly assert that their own attorney, Mr. Fusco, submitted conflicting affidavits as to whether he was served with a copy of the subpoena. Petition, pp. 7 and 9. But as the Sixth Circuit correctly found, "the uncontroverted evidence shows that [Petitioners'] attorney was timely provided with a copy of the subpoena." Petition, Court of Appeals Opinion – 9/2/99, p. 15a.

pursuant to the subpoena. Petitioners state that they were "appalled" to learn that Respondent Gonzales had obtained their loan file from Star Bank. Petition, p. 14. Their attorney had apparently not advised them that it had been subpoenaed.

Three years later, on October 28, 1996, Petitioners filed a lawsuit against Star Bank, its statutory agent (Respondent Thomas R. Green) and a Vice President of Star Bank (Respondent Paul Beery). Petitioners, who were represented by counsel at that time,[2/] filed their claims in the United States District Court for the Southern District of Ohio, although there was an obvious lack of complete diversity and their complaint did not raise any federal claims. Petitioners dismissed the case after Star Bank filed a motion to dismiss for lack of subject matter jurisdiction.

Petitioners then refiled their claims on June 13, 1997 in a 35 page complaint containing 13 causes of action against the 15 Respondents and seeking over $20,000,000 in compensatory and punitive damages, all as a result simply of the production of a loan file pursuant to a facially valid subpoena. Their new Complaint alleged claims under the Fair

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[2/] The Ohio Supreme Court has since suspended that attorney from the practice of law for an indefinite period of time for unrelated reasons. *Columbus Bar Assn. v. Elsass*, 86 Ohio St.3d 195, 713 N.E.2d 421 (Ohio 1999). Petitioners are now acting *pro se*.

Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681u, as well as constitutional right to privacy and civil rights claims, among others.

Based upon the undisputed factual evidence presented to the District Court, summary judgment was granted in favor of Respondents on all of Petitioners' claims. Petition, Appendix B-D. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, and subsequently denied Petitioners' Petition for Rehearing and Petition for Rehearing En Banc. Petition, Appendix A and E.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' "QUESTIONS PRESENTED" RELATING TO FCRA ARE IRRELEVANT TO THE SIXTH CIRCUIT'S DECISION THAT PETITIONERS' FCRA CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Three of Petitioners' six proposed Questions for Review are irrelevant because they relate to issues that were not part of the Sixth Circuit's basis for its decision. Petitioners argue in **Question II** that a subpoena signed by an attorney cannot be considered an "order of a court" under FCRA, 15 U.S.C. § 1681b, and for that reason Star Bank violated FCRA by producing their loan file in response to

such a subpoena.[3] In **Question IV**, Petitioners argue that because their loan file contained a credit report, Star Bank should be liable as a "user" under FCRA for producing it to Respondent Gonzales pursuant to a subpoena. They further suggest that the 84 Lumber Respondents and the G-P Respondents, who were merely Petitioners' opponents in the Drywall Litigation, are also liable as "users" under FCRA. In **Question V**, Petitioners argue that Star Bank is a "consumer reporting agency" under FCRA and thus should be liable for disclosure of the loan file. However, because the Sixth Circuit's decision with respect to Petitioners' FCRA claims was based entirely on the statute of limitations, the issues raised in **Questions II, IV and V** were not even discussed by the Sixth Circuit.[4]

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[3] In fact, the Ohio Rules of Civil Procedure authorize an attorney to sign and issue a subpoena "on behalf of the court in which an action is pending." *See* Ohio Civ.R. 45(A)(2).

[4] Contrary to Petitioners' assertions, the Sixth Circuit did not rule that Star Bank was not a "consumer reporting agency" under FCRA, nor that a "consumer report" loses its status under FCRA "when it is disseminated from a user to a third party user," nor that the acquisition of Petitioners' loan file by Respondent Gonzales "was permissible under FCRA." Petition, pp. 17 and 21-24. Instead, the Sixth Circuit simply ruled that any claims that Petitioners might have had against any of the Respondents under FCRA are barred by the statute

(continued...)

Because **Questions II, IV and V** were not decided below and were not part of the basis for the Sixth Circuit Court of Appeals' decision, they are not appropriate "Questions Presented for Review" to this Court. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459 (1999) (Supreme Court would not decide issue raised in party's brief to the Circuit Court of Appeals, but not decided below); *see also, Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 379 (1996) ("We generally do not address arguments that were not the basis for the decision below.")

Petitioners' time to file claims under FCRA began to run, at the latest, on October 29, 1993, when they discovered that Respondent Gonzales had obtained a copy of their loan file from Star Bank. Because Petitioners did not file any action under FCRA until June 13, 1997, three and one-half years later, the Sixth Circuit concluded that Petitioners' claims were barred by FCRA's two year statute of limitations, 15 U.S.C. § 1681p. Petition, Court of Appeals Opinion – 9/2/99, p. 8a. In reaching this conclusion, the Sixth Circuit held that Petitioners' allegations were not sufficient to toll the two year statute of limitations under FCRA because no representative of Star Bank had made any willful misrepresentation of material information that was required

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[4/] (...continued)
of limitations. Petition, Court of Appeals Opinion – 9/2/99, p. 8a.

to be disclosed under FCRA. *Id.* Petitioners' **Question VI** is nothing more than an invitation for this Court to review those allegedly erroneous factual findings because Petitioners do not agree with them. This is not a proper basis for seeking review in this Court.[5/]

Since **Questions II, IV and V** raise issues that were not even part of the Sixth Circuit's decision, they are not proper subjects for appeal and are not subject to review by this Court. Similarly, **Question VI**, which merely alleges that the Sixth Circuit made erroneous factual findings with respect to the alleged misrepresentations by a Star Bank

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[5/] Petitioners apparently do not understand the Sixth Circuit's ruling on this issue and have misstated it in their Petition. They claim that the Sixth Circuit has ruled that an attorney-issued subpoena which has "every appearance of being 'an order of the court'" is valid under FCRA. Petition, p. 16. What the Sixth Circuit actually held is that, because the subpoena had every appearance of being "an order of a court," a Star Bank representative did not make a willful misrepresentation when he informed Mr. Hahn that Petitioners' loan file had been released pursuant to a valid subpoena. Petition, Court of Appeals Opinion – 9/2/99, p. 7a. Because there was no willful misrepresentation, FCRA's tolling provision did not apply, and Petitioners' claims were barred by the FCRA statute of limitations. *Id.* at 8a. Whether the subpoena was actually "an order of a court" under FCRA was not addressed by the Sixth Circuit and is not relevant.

representative, is also not an appropriate question for review by this Court. *See* S.Ct. Rule 10.

II. THE SCOPE OF DISCOVERY AVAILABLE ON A MOTION FOR SUMMARY JUDGMENT IS WELL-SETTLED AND IS NOT AN APPROPRIATE ISSUE FOR REVIEW BY THIS COURT.

In **Question III**, Petitioners argue that they were denied the opportunity to conduct sufficient discovery prior to the district court's summary judgment decision. Not only is this factually incorrect, it is simply a routine discovery issue that is not an appropriate issue for review by the United States Supreme Court.[6/]

A district court's decision to limit discovery will be reversed on appeal only if the decision was an abuse of discretion resulting in substantial prejudice. *See Emmons v.*

[6/] Discovery was stayed in the case below shortly after Star Bank filed its motion for summary judgment, and Petitioners were informed that they could move for additional discovery if they believed that it was needed. Petition, Court of Appeals Opinion – 9/2/99, p. 23a. Petitioners were represented by counsel at that time, but no affidavit under Fed.R.Civ.P. 56(f) requesting additional discovery was filed until several months later – after the court had already granted summary judgment in favor of Star Bank. *Id.*

McLaughlin, 874 F.2d 351, 356-57 (6th Cir. 1989). In the present case, the Sixth Circuit reviewed the district court's decision and held that the district court did not abuse its discretion in limiting discovery, when no affidavit was timely filed under Fed.R.Civ.P. 56(f). Petition, Court of Appeals Opinion – 9/2/99, p. 23a. Petitioners' statement that the Sixth Circuit "never ruled on our motion for discovery and our 56(f) affidavit" is simply not true. Petition, p. 18. In fact, the Sixth Circuit held, after reviewing Petitioners' affidavit, that none of the additional discovery requested was relevant to its decision and, therefore, Petitioners could not have been substantially prejudiced. Petition, Court of Appeals Opinion – 9/2/99, p. 23a.[7/]

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. Rule 10. The law with respect to the conduct of discovery in the context of a summary judgment motion is well-established.

[7/] Petitioners are also incorrect in their assertion that the "District Court granted summary judgment to Star Bank on the sole evidence of an affidavit of an interested party, James J. Barresi, an employee of Star Bank." Petition, pp. 7, 19 and 24. While Mr. Barresi's affidavit was among the evidence that the court considered, it was not the sole evidence. Indeed, it was not even relevant to the statute of limitations issue on which the Sixth Circuit based its affirmance of the dismissal of Petitioners' FCRA claims.

See Fed.R.Civ.P. 56(f); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986). Petitioners do not allege that the law on this issue is incorrect; they simply do not like the way that it was applied in this case, and they disagree with the factual conclusions made by the court. This is not a proper subject for review by this Court.

III. THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE OF WHETHER A PRIVATE ATTORNEY ISSUING A SUBPOENA IN A STATE COURT PROCEEDING IS A "STATE ACTOR" FOR PURPOSES OF 42 U.S.C. § 1983.

Petitioners' **Question I** poses the question of whether an attorney who issues a subpoena in a state court proceeding is a "state actor" or is acting "under color of state law" for purposes of 42 U.S.C. § 1983. The Sixth Circuit held that Respondent Gonzales, a private attorney, did not act under color of state law within the meaning of § 1983 when he issued a subpoena to Star Bank. Petition, Court of Appeals Opinion – 9/2/99, pp. 17a-18a. Thus, the Sixth Circuit affirmed the District Court's denial of Petitioners' motion for leave to amend their complaint to include a claim under 42 U.S.C. § 1983 that Respondents, acting under color of state

law, deprived them of their constitutional rights in obtaining Petitioners' loan file from Star Bank.[8/]

At least two other circuits have reached the same conclusion as the Sixth Circuit on this identical issue. *See Angelico v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268 (3rd Cir. 1999) (attorney issuing a subpoena is merely "resorting to an available state procedure" and is not using state officials to enforce that procedure); *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983) ("attorney does not become a state actor merely by employing state authorized subpoena power"). *See also, Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963) (private attorney is not acting under color of state law in noticing and taking the deposition of a party). In addition, the Sixth Circuit's decision in this case is consistent with this Court's holding that private attorneys, by virtue of being "officers of the court," are not state actors under color of sate law within the meaning of § 1983. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). Respondents are aware of no Circuit Court of Appeals decision, nor have Petitioners identified any, that is in conflict with the Sixth Circuit's decision on this issue. Thus, there is no split among the circuits, and Supreme Court review of this issue is neither necessary nor appropriate.

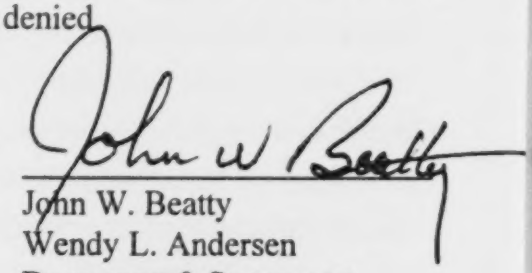
[8/] The issuance of a subpoena by an attorney is an available procedure that is authorized under Ohio law. *See* Ohio Civ.R. 45(A)(2).

Finally, although not specifically identified as a "Question Presented for Review," Petitioners also argue in their Petition that they should have been permitted to amend their Complaint to add a procedural due process claim under 42 U.S.C. § 1983. Petition, pp. 12-13. The Sixth Circuit held that an amendment of the Complaint to add that claim would have been futile because Petitioners could not demonstrate that the available state procedures were inadequate, or that they had a constitutionally protected property interest in the privacy of their loan file. Petition, Court of Appeals Decision – 9/2/99, pp. 14a-15a.[2/] The Sixth Circuit also held that because Petitioners did not have a claim under FCRA, they had no property rights in their loan file warranting protection under the Due Process Clause. *Id.* Petitioners' plea to this Court is based upon their disagreement with the Sixth Circuit's application of well-settled federal law. There is no split among the circuits requiring resolution by this Court.

[2/] In reaching this conclusion, the Sixth Circuit noted that Petitioners' counsel in the Drywall Litigation had been served with a copy of the subpoena and could have followed state procedures to object to the subpoena, but failed to do so. *Id.* Petitioners cannot bring a federal due process claim after failing to take advantage of state procedures which allowed them to file a motion to quash the subpoena.

CONCLUSION

For the reasons given above, Petitioners' Petition for Writ of Certiorari should be denied.



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